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No. 99-1268

IN THE

Supreme Court of the United States

KENNECOTT UTAH COPPER CORPORATION,
Petitioner,

v.

GEORGE BECKER; WAYNE HOLLAND, JR.; TOM PERFILI;
SUBDISTRICT 5, UNITED STEELWORKERS OF AMERICA;
LOCAL 392, UNITED STEELWORKERS OF AMERICA;
AFL-CIO/CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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Respondents George Becker; Wayne Holland, Jr.; Tom Perfili; Subdistrict 5, United Steelworkers of America; Local 392, United Steelworkers of America; and United Steelworkers of America, AFL-CIO/CLC (collectively "USWA") submit this brief in opposition to the petition for *certiorari* filed by Petitioner Kennecott Utah Copper Corporation ("Kennecott") in No. 99-1268, which seeks review of the decision in *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999).

ARGUMENT

1. The sole question decided by the Court of Appeals and presented by this case is this: does the public policy stated in the Utah Drug and Alcohol Testing statute, Utah Code Ann. § 34-38-1 to 14, preclude enforcement of a labor arbitration award that orders reinstatement of an employee discharged for a positive drug test, where (i) the statute permits but does not require Utah employers to drug and alcohol test their Utah employees; (ii) the statute does not mandate any penalty or discipline for an employee who tests positive; and (iii) the permissible drug testing is not limited to employees holding safety sensitive jobs and there is no finding by the arbitrator, the district court, or the Court of Appeals, that the discharged employee held a safety sensitive position.[1]

The Court of Appeals answered this question "no." Its decision is consistent with *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the leading public policy/labor arbitration decision of this Court. In *Misco* this Court held "that a court's refusal to enforce an arbitrator's *interpretation* of [collectively-bargained] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'" 484 U.S. at 43 (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))). And, as the Court of Appeals recognized, the Utah law's blanket permission to Utah employers to drug test any and all of their employees, simply does not state a "public policy" that precludes enforcement of any and all labor arbitration awards that conclude that, given the

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[1] This arbitration concerns a Kennecott employee who drove a dump truck inside the confines of a Kennecott open pit copper mine.

terms of the governing collective bargaining agreement and all the facts and circumstances, a particular employee's positive drug test is not just cause for discharge and that the employee should be reinstated to his job. Indeed, the Utah statute specifically states that the employer may take actions "in conformance with the employer's usual procedures, including any collective bargaining agreement." Utah Code Ann. § 34-38-8(5). So far as our research on the *certiorari* petition shows, no Court of Appeals has ever ruled that a law like the Utah law precludes the enforcement of a labor arbitration award like the one here.

Equally to the point, the question presented here and the decision below are entirely distinct from the public policy/labor arbitration question presented in *Eastern Assoc'd Coal Corp. v. United Mine Wkrs, Dist. 17*, No. 99-1038 (*certiorari* granted March 20, 2000) and from the conflicting Court of Appeals decisions considering that question.[2] As stated in the *Eastern Assoc'd Coal Corp. certiorari* petition, the questions presented in that case are:

> (1) Is there well defined and dominant public policy that prohibits enforcement of arbitration awards requiring reinstatement to safety-sensitive positions of employees who test positive for illegal drugs, as First, Third, Fifth, Eighth, and Eleventh Circuits have held, or, as Second, Sixth, Ninth, Tenth, and now Fourth Circuits have held, does no such policy exist and must courts therefore uphold reinstatement to safety-sensitive positions of those who test positive for illegal drugs?

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[2] We recognize that if this case did indeed raise a variation on the question presented in *Eastern Assoc'd Coal Corp.*, it would be proper to hold the *certiorari* petition here for later consideration in light of the Court's decision on the merits in *Eastern Assoc'd Coal*. But for the reasons given in the text, we submit that the question presented here and in that case are distinguishable and therefore the *certiorari* petition here should be denied.

> (2) Should arbitration award be vacated on public policy grounds only when award itself violates positive law or requires unlawful conduct by employer, as Fourth, Ninth, and District of Columbia Circuits have held, or, as First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held, may such award violate public policy without violating positive law -- question on which this court granted certiorari, but did not reach, in *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29 (1987)?

As that *certiorari* petition shows, there is, indeed, a lower court dispute as to whether public policy precludes the enforcement of arbitration awards concluding that a positive drug test is not just cause for a discharge from a *safety sensitive* job and providing for reinstatement of the employee to such a job. But the critical point is that all the Courts of Appeals that answer the question "yes" predicate their conclusion on a public *safety* policy implicated by the *safety sensitive* nature of the job to which the employee seeks reinstatement. No Court of Appeals has ever refused enforcement of a labor arbitration decision on public policy grounds where the employee job at issue was not found to be a safety sensitive job which if improperly performed posed risks to public safety.[3]

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[3] *Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 843, 848-849 (1st Cir. 1997) ("[The discharged employee Smith] typically drives this rig through many of New England's more densely populated areas. Exxon requires employees who occupy designated *safety-sensitive positions—and Smith's is plainly such a position*—to sign so-called compliance statements . . . [agreeing to] random drug testing. . . . In our judgment, society has achieved a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs. This consensus is made manifest by positive law and translates into a well defined and dominant policy public policy--indeed, a national crusade--counseling against the performance of *safety-sensitive tasks* by individuals who are so impaired. . . . The pertinent public policy dictates not only that employees refrain from

performing *safety-sensitive jobs* while under the influence of drugs but also that employers develop (and enforce) programs designed to discourage such activity") (emphasis added); *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 854, 856 (5th Cir. 1996) ("The Union admits that *a public policy against drug use in safety sensitive positions exists; . . .* It is undisputed that [the discharged employee] *occupied a safety-sensitive position*") (emphasis added); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1289 (3d Cir. 1996) ("Although Coast Guard regulations do not mandate discharge for an employee--*even one in a safety sensitive position*--who refuses a drug test, we conclude that if Exxon had cause to require a test [the employee's] reinstatement following his refusal would violate public policy because it would undercut enforcement of *Coast Guard regulations and environmental statutes which denote a well defined and dominant public policy against permitting intoxicated crew members to operate oil tankers and other common carriers*") (emphasis added); *Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189, 1196, (3d Cir. 1993) ("we conclude that there is a *well defined and dominant policy that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty. An intoxicated crew member on such a vessel can cause loss of life and catastrophic environmental and economic injury.* Some of this injury may not be reparable by money damages. Moreover, under the Clean Water Act and the Oil Pollution Act, it is entirely possible that much of the cost resulting from a major oil spill may fall on taxpayers and those who are injured by the accident") (emphasis added); *Union Pacific R. Co. v. UTU*, 3 F.3d 255, 262 (8th Cir. 1993) ("*What violates public policy in this case is the Board's decision to reinstate to his former position a railroad employee who poses a significant risk to the public* because of his potential for future drug use on the job") (emphasis added); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) ("we hold the award reinstating [the employee] violates the *public policy protecting the public and the environment against operation of vessels by drug users*") (emphasis added); *Gulf Coast Industrial Workers v. Exxon Co., USA*, 991 F.2d 244, 256 (5th Cir. 1993) ("We conclude that compelled continued employment of Woods in *a safety-sensitive* position is sufficient to represent a plain violation of 'well defined and dominant' public policy") (emphasis added); *Delta Airlines, Inc. v. ALPA*, 861 F.2d 665, 674 (11th Cir. 1988) ("What [the employee] did as performance of his employment is the very thing which *offends public policy. He flew an airplane while drunk and endangered the lives of his passengers and crew*") (emphasis added).

By the same token, all of these Courts of Appeals relied on a far more pointed expression of public policy than the mere blanket permission to employers to drug test employees relied on by petitioner Kennecott here.[4]

We note, in this regard, the *certiorari* petition misstates the Court of Appeals' response to Kennecott's reliance on *Exxon*

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[4] *See, Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 848 (1st Cir. 1997) (citing various state laws criminalizing the operation of commercial motor vehicles by persons who are under the influence of alcohol or controlled substances, and citing federal statutes and regulations requiring the establishment of drug and alcohol testing and other programs for operators of commercial motor vehicles); *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 851, 856 (5th Cir. 1996) and *Gulf Coast Industrial Workers v. Exxon Co., USA*, 991 F.2d 244, 250 (5th Cir. 1993) (citing fact that the employer is "bound as a government contractor" to comply with the Drug-Free Workplace Act, 41 U.S.C. §§ 701-707, which requires a contractor to have "certified to the contracting [federal] agency that it will provide a drug free workplace" and citing similar Defense Department regulations, 48 C.F.R. 223.5); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1292-1293 (3d Cir. 1996), *Exxon Shipping Co. v. Exxon Seaman's Union*, 11 F.3d 1189, 1193 (3d Cir. 1993), and *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 360-361 (3d Cir. 1993) (citing Coast Guard regulations requiring that employees on vessels testing positive for drugs "shall be denied employment . . . or removed from [safety sensitive] duties (46 C.F.R. § 16.201(c)), prohibiting those employees from returning to work aboard a vessel absent proof of rehabilitation (46 C.F.R. § 16.370(d)), and criminalizing intoxication by crew members on duty (33 C.F.R. § 95.055); *Union Pacific R. Co. v. UTU*, 3 F.3d 255, 261-262 (8th Cir. 1993) (citing Federal Railroad Administration regulations prohibiting railroad employees' usage of alcohol or drugs while on duty and from reporting for duty while under the influence (49 C.F.R. § 219.101), prohibiting usage of controlled substances at any time, whether on duty of off (49 C.F.R. § 219.201), establishing a mandatory comprehensive testing scheme (49 C.F.R. § 219.201, 301, 501, 601); *Delta Airlines, Inc. v. ALPA*, 861 F.2d 665 (11th Cir. 1988) (citing Federal Aviation Administration regulations forbidding an employee from acting as a crewmember of a civil aircraft within 8 hours after consumption of alcohol).

Corp. v. Esso Workers' Union, supra, 118 F.3d 841. As already indicated, in *Exxon Corp.*, the First Circuit concluded that public policy "dictates not only that employees refrain from performing safety-sensitive jobs while under the influence of drugs but also that employers develop (and enforce) programs designed to discourage such activity." 118 F.3d at 849. The First Circuit concluded that in accordance with "the discerned public policy, we hold that forcing an employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as a part of a drug-free workplace [Drug Free Workerplace Act, 41 U.S.C. § 701 *et seq.*] program would undermine that policy." *Id.* at 850.

Contrary to Kennecott's contention, the Court of Appeals did not "expressly reject[ ] the public policy found by the First Circuit" (Pet. 12). Rather, the court below found it "easy to be sympathetic to the expanded policy," but it "question[ed] whether [as urged by Kennecott] a federal court's finding of a violation of this policy in *every* positive drug test case, without regard to the specific facts . . . can be squared with the Supreme Court's admonition that case-specific facts matter and it is the province of the arbitrator, and not the courts, to find such facts" (Pet. 15a) (emphasis added). The Court of Appeals determined that it did not have to answer the question of the applicability of the "expanded policy" in every instance in which an employee tested positive for drugs because, "[i]n any event, Kennecott does not rely upon the same provisions at issue in *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d at 847-848, and its reliance upon the various sections of Utah law discussed above is not persuasive to demonstrate the alleged public policy" (Pet. 15a). Thus, the Court of Appeals did not reject the expanded public policy relied upon by the First Circuit in *Exxon Corp.* Rather, the court below concluded that given the facts in this case, including the nature of the job and the terms of the Utah law, the "expanded policy" had no application in this instance.

2. Kennecott also contends that the petition for *certiorari* should be granted because the arbitrator's award did not draw its essence from the contract (Pet. 17-25). Kennecott's claim in this regard is that the collectively-bargained agreements between the USWA and Kennecott unequivocally guarantee Kennecott the unchallengeable discretion to terminate an employee who tests positive on a drug test. The arbitrator rejected that claim, and, as the Court of Appeals pointed out, the claim is "simply a matter of interpretation" and under this Court's well-settled law "a reviewing court may not substitute its interpretation for that of the arbitrator" (Pet. 8a). In this the court below was entirely correct and the *certiorari* petition does not even claim that the decision is in conflict with that of any other court.[5]

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[5] Similarly, Kennecott's claim that the arbitrator "added a requirement" (Pet. 21-22) to the contract through his interpretation of the requirements of just cause to discharge and "relied on his own notions of a 'proper' drug testing policy" (Pet 24) in suggesting that even discipline under the agreements required some evidence of on-the-job impairment possession or use, simply reflects the depth of Kennecott's disagreement with the arbitrator's interpretation of the collective bargaining agreement and raises no legal issue of substance.

CONCLUSION

For the reasons stated, the petition for *certiorari* should be denied.

Respectfully submitted,

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